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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

No. 01-1491

CHARLES DEMORE, DISTRICT DIRECTOR, SAN FRANCISCO DISTRICT OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Petitioner,

v.

HYUNG JOON KIM,
Respondent.

BRIEF FOR *AMICI CURIAE* LAW FACULTY IN SUPPORT OF RESPONDENT

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 11

I. ALL NON-CITIZENS WITHIN THE UNITED STATES ARE PROTECTED BY THE CONSTITUTION WHEN THE GOVERNMENT ACTS TO DETAIN OR TO REMOVE THEM 11

A. The Plenary Power Doctrine Was First Developed in a Largely Discredited Case Involving the Exclusion of Non-citizens 11

B. There is a Well-Recognized Distinction Between the "Plenary Power" of Congress as to Substantive Immigration Laws and the Constitutional Limits on that Power to Detain Individuals Within the United States 16

II. THIS COURT HAS APPLIED THE PLENARY POWER DOCTRINE TO THE DETENTION OF LAWFULLY ADMITTED PERMANENT RESIDENTS DURING REMOVAL PROCEEDINGS TO A MUCH LESSER EXTENT THAN TO NON-CITIZENS SEEKING ADMISSION 23

III. THE PLENARY POWER DOCTRINE DERIVES FROM THE COURT'S

RECOGNITION OF THE EXECUTIVE'S AUTHORITY OVER FOREIGN AFFAIRS, A CONSIDERATION WITH VIRTUALLY NO RELEVANCE TO THIS CASE **26**

IV. CONCLUSION **28**

TABLE OF AUTHORITIES

FEDERAL CASES

Addington v. Texas, 441 U.S. 418 (1979) 19

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 16

Baker v. Carr, 369 U.S. 186 (1962) 26

Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.; en banc), cert. denied, 516 U.S. 976 (1995) 27

Bridges v. Wixon, 326 U.S. 135 (1945) 10, 21

Carlson v. Landon, 342 U.S. 524 (1952) 22, 23

Chae Chan Ping v. United States (The Chinese Exclusion Case) 130 U.S. 581 ..... 5, 11, 13 26

Chowdhury v. INS, 249 F.3d 970 (9th Cir. 2001) 9

Ekiu v. United States, 142 U.S. 651 (1892) 11, 12

Fiallo v. Bell, 430 U.S. 787 (1977) 26

Fong Yue Ting v. United States, 149 U.S. 698 (1893) ... 14, 15

Foucha v. Louisiana, 504 U.S. 71 (1992) 18

Galvan v. Press, 347 U.S. 522 (1954) 17

Gisbert v. U.S. Attorney General, 988 F.2d 1437 (5th Cir. 1993) 27

INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 26, 27

INS v. Chadha, 462 U.S. 919 (1983) 27

INS v. St. Cyr, 533 U.S. 289 (2001) 9

Jackson v. Indiana, 406 U.S. 715 (1972) 19

Jean v. Nelson, 472 U.S. 846 (1985) 17

Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) aff'd, 472 U.S. 846 ..... 14, 27

Johnson v. Eisentrager, 339 U.S. 763 (1950) 10, 21

Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001) 9

Kansas v. Hendricks, 521 U.S. 346 (1997) 18

Kleindienst v. Mandel, 408 U.S. 753 (1972) 26

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) 27

Landon v. Plasencia, 459 U.S. 21 (1982) 8, 9, 13, 24

Leng May Ma v. Barber, 357 U.S. 185 (1958) 24

Lochner v. New York, 198 U.S. 45 (1905) 5

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). 3, 24

Plessy v. Ferguson, 163 U.S. 567 (1896) 5

Plyler v. Doe, 457 U.S. 202 (1982) 19

Reid v. Covert, 354 U.S. 1 (1957) 13

Reno v. Flores, 507 U.S. 292 (1993) 22, 23, 24

Sareang Ye v. INS, 214 F.3d 1128 (9th Cir. 2000) 9

Scott v. Sanford, 60 U.S. 393 (1856) 5

Shaugnessy v. Mezei, 345 U.S. 206 (1953) 9, 14, 18, 21, 26

United States v. Salerno, 481 U.S. 739 (1987) 3, 4, 7, 18,21

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) 29

United States v. Hare, 873 F.2d 796 (5th Cir. 1989) 18

United States v. Theron, 782 F.2d 1510 (10th Cir. 1986) 18

Wong Wing v. United States, 163 U.S. 228 (1896) 4, 15, 16, 17, 19

Yamataya v. Fisher, 189 U.S. 86 (1903) 5, 20,21

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 4, 16, 20, 22

Zadvydas v. Davis, 533 U.S. 678 (2001) 4, 9, 10, 19, 21

STATUTES & REGULATIONS

Art. I, § 2, cl. 2 21

Art. I, § 3, cl. 3 21

Art. I, § 1, cl. 5 21

8 U.S.C. § 1101(a) 2, 11, 25, 28

8 U.S.C. § 1182(a) 2, 8

8 U.S.C. § 1226(c) 2, 4, 8, 9, 17, 22

8 U.S.C. § 1227(a) 2

8 U.S.C. § 1231(b) 8

28 U.S.C. § 2241 3

50 U.S.C. § 453 25

8 C.F.R. § 1.1 11

Alien Enemies Act, ch. 66, 1 Stat. 577 23

Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) 23

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009 ..... 2, 5

Sedition Act, ch. 74, 1 Stat. 596 (1798) 23

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Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,* 100 Yale L.J. 545 ..... 12, 14

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Constitutional Rights, 92 Colum.L.Rev. 1625, 1632-50 12

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Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. Rev.. 933, 939-951 12

The Kentucky Resolution, Documents of American History 181 (Henry Steele Commanger ed., 6th ed. 1958) 20

8 Annals of Cong. 2012 24

INTEREST OF *AMICI CURIAE*

Amici Curiae are law professors whose individual names appear at the conclusion of this brief. Many of us have written about the principles that the government invokes in this appeal. Although there may be some differences among us about the precise origins and certain aspects of what is generally referred to as "the plenary power doctrine," all conclude that, whatever may be the outer limits of the government's substantive authority to regulate immigration, there is absolutely no question that the removal power of the government, especially the power to detain lawful permanent resident non-citizens, is meaningfully limited by the requirements of due process. *Amici* support affirmance, and write to situate the issues raised by this case within the broader context of constitutional immigration law. In particular, *amici* disagree with the government's contention that judicial deference is appropriate in this case due to the plenary power doctrine.

Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part. The brief was written by counsel for *Amici Curiae* with the assistance of Anaysa Gallardo, Rita Kraner, and Elizabeth Weir, students at Boston College Law School. No one other than *Amici Curiae*, Boston College Law School, or counsel for *Amici Curiae* has made a monetary contribution to the preparation or submission of the brief.

Both Petitioner and Respondent have consented to the filing of this brief. Letters of consent have been lodged with the clerk.

STATEMENT OF THE CASE

Respondent Hyung Joon Kim, a citizen of the Republic of Korea, entered the United States legally as a six year old child in 1984. (Pet. App. 2a). He became a lawful permanent resident of the United States in 1986, at the age of eight. (*Id.* at 31a-32a). A decade later, in 1996, at the age of eighteen, Mr. Kim was convicted of a crime for which he received a suspended sentence. (*Id.* at 32a). In April 1997, he was convicted of "petty theft with priors," and sentenced to three years' in prison. (*Id.*) Despite his long residence, entry as a child, family ties, and various other humanitarian factors, Mr. Kim was charged by the U.S. Immigration and Naturalization Service (INS) with being subject to removal due to his 1997 conviction for an "aggravated felony."[1] (*Id.*). *See* 8 U.S.C. §§ 1101(a)(43)(g), 1227(a)(2)(A)(iii)(2002). He was taken into custody by INS on February 9, 1999. Due to the requirements of 8 U.S.C. 1226(c),[2] INS refused to release him on bond or even to grant him a meaningful bond hearing. (*See* Pet. App. at 33a).

Mr. Kim sought judicial relief in the form of a *habeas corpus* action brought pursuant to 28 U.S.C. § 2241 in the United States District Court for the Northern District of California. (Pet. App. at 2a, 31a, 33a). He challenged § 1226(c) as facially unconstitutional because it precludes an individualized bond hearing in violation of both substantive and procedural guarantees of due process under the Fifth Amendment. The District Court declared §1226(c) unconstitutional on its face and ordered a meaningful, individualized bond hearing at which assessment could be made whether Mr. Kim presented either a flight risk or a danger to the community. (*Id.* at 31a-51a). The district court held specifically that "lawful resident aliens" possess both substantive and procedural due process rights and the § 1226(c) scheme failed on both counts, pursuant to *United States v. Salerno*, 481 U.S. 739, 747 (1987) and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). (Pet. App. at 39a-50a).

The court of appeals affirmed on the specific ground that § 1226(c) violated due process as applied to Mr. Kim, a lawful permanent resident. (Pet. App. at 30a). The court held that "a lawful permanent resident in removal proceedings cannot constitutionally be deprived of 'a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community.' (*Id.* at 30a).

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[1] In August 2002, Mr. Kim was charged as subject to removal on additional grounds, arising from the 1996 and 1997 convictions. *See* 8 U.S.C. 1227(a)(2)(A)(ii) (stating "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.") These additional charges do not affect the constitutional issues presented to the Court in this case. *Amici* also understand that Mr. Kim may contest all asserted grounds in proceedings before the Immigration Court.

[2] The INS detained Mr. Kim pursuant to 8 U.S.C. § 1226(c), part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. The section as a whole is entitled "Detention of criminal aliens." Section 1226(c)(1) provides, in relevant part,

> "The Attorney General shall take into custody any alien who--
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."

SUMMARY OF ARGUMENT

The fundamental protections of the Fifth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). As this Court has recently noted, "[o]nce an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001).

The mere fact that a non-citizen has been arrested and charged as 'subject to removal' does not strip a person, even one who may have been convicted of a crime, of the right to be free of unconstitutional detention. *Wong Wing v. United States*, 163 U.S. 228, 236-38 (1896). This is especially true in the case of a lawfully admitted permanent resident with long residence in the United States since childhood and extensive family and community ties, such as the Respondent, Hyung Joon Kim. In our society, liberty is the norm, and detention prior to trial is the carefully limited exception. *United States v. Salerno*, 481 U.S. 739, 755 (1987). This Court has repeatedly confirmed the "general rule" of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial. *Id.* at 749.

Among other arguments made by Petitioners in this case is the general claim that the "policy judgments that Congress made when it enacted § 1226(c) are within its plenary power over the admission and expulsion of aliens and deserve judicial deference." (U.S. Petitioner's Brief at 13, *DeMore v. Kim*, 2002 WL 31016560 (9th Cir. 2002) (No.

01-1491)). This argument -- when applied to this case -- rests upon a series of implicit omissions and fundamental misunderstandings about the so-called 'plenary power doctrine.' It should not be overlooked that the doctrine at the root of Petitioner's deference arguments had its origins in what--apart from *Scott v. Sanford,* 60 U.S. 393 (1856); *Plessy v. Ferguson,* 163 U.S. 567 (1896) and *Lochner v. New York,* 198 U.S. 45 (1905) -- may be the most criticized case in all of U.S. jurisprudence, *Chae Chan Ping v. United States*, (*The Chinese Exclusion Case*) 130 U.S. 581 (1889). That case has been well-described as "a constitutional fossil, a remnant of pre-rights jurisprudence that we have proudly rejected in other respects." Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L.Rev. 853, 862 (1987).[3] While the present case does not require the court to re-examine the plenary power doctrine entirely, a doctrine of such dubious parentage that is so deeply contradictory to the better norms of our constitutional legal system should be invoked, if at all, with great care and in the most limited ways possible. It should certainly not be extended into the realm of constitutional consideration of the mandatory detention of lawful permanent residents.

Indeed, for nearly a century, this Court has recognized the inapplicability of the plenary power doctrine to the procedures of deportation. As this Court noted in *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903), "this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" The government's assertion that only deferential judicial review is required when detention of non-

[3] Moreover, as one scholar has demonstrated, the doctrine appears to have evolved inadvertently out of misplaced reliance on cases that meant merely to emphasize the power of the federal government. *See generally*, Stephen H. Legomsky, IMMIGRATION AND THE JUDICIARY, (Oxford University Press 1984).

citizens is at issue is an incorrect overgeneralization. (Pet. Br. 14). To the contrary, the doctrine has *never* been held dispositive as to the issue presented by this case: the constitutionality of executive detention of lawful permanent residents within the United States without time limit and without a meaningful individualized hearing. Indeed, to so hold would be to overrule some of the deepest and best constitutional traditions of our nation. As James Madison once noted, "[even if] aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them..." James Madison, *Report on the Virginia Resolutions*, 4 Debates, Resolutions and Other Proceedings, in Convention on the Adoption of the Federal Constitution 556 (Jonathan Elliot, 2d ed. 1836).

More specifically, the government also asserts that, "Congress acted within the scope of its plenary immigration powers" when it used a "categorical approach" in the detention context. (Pet. Br. 14, 32-33). The government suggests that the judiciary should defer to the choices made by the political branches as to mandatory detention of non-citizens. This suggestion overstates both the meaning of the term 'plenary' in the immigration context and the possible significance of a 'categorical approach.' The former is irrelevant in the context of detention of lawful permanent residents and the latter cannot override due process protections. While Congress' substantive judgments about who should be admitted into or deported from the United States may be entitled to deference because of the plenary power doctrine, this deference does not extend in any meaningful way to detention. The Court's immigration detention decisions have reflected essentially the same focus on individualized determinations as have detention decisions in other areas of law. To permit 'categorical' exceptions to due process based solely upon the citizen/non-citizen line would eviscerate over a century of due process precedent and usher in a radical regime of unfettered government power

over millions of legal permanent residents and others within the United States. *See* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Const. L.Q. 1087 (1995) (describing how certain judicial approaches to the detention of aliens have 'infiltrated' other areas of constitutional law).

The plenary power doctrine has also *never* been held dispositive as to the due process protections of persons, such as Mr. Kim, who are lawful permanent residents of the United States. *See generally,* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas*, 2001 Sup. Ct. Rev. 47 (2002) (noting how the mix between concerns of social reality and legal status is intricate and highlighting, "the premier status given in law and social reality to lawful permanent resident status.") Whatever may be the outer boundaries of due process protections, the most basic, long-standing distinction in all of this Court's jurisprudence about the Constitutional status of non-citizens is that between the government's broad authority to determine who may enter the United States versus its more limited power to detain and remove people. The government's interest in detaining people, such as Mr. Kim, who have already been admitted to this country, differs markedly from its stake in refusing to admit large numbers of first-time applicants for admission. The invocation of plenary power by the government in the context of this case is at best a make-weight or a smokescreen. At worst, it is an invitation to an unconscionable retrenchment on the constitutional protection of liberty for all persons within the United States.

Amici are concerned that the government makes rather sweeping generalizations about the relationship between 'plenary power' and individual rights that range from the completely incorrect:

> (an alien who was stopped at the border has no due process claim to be released from detention"

(Pet. Br. at 10).)

But see, *Landon v. Plasencia*, 459 U.S. 21, 41 (1982) (returning lawful permanent residents stopped at the border retain procedural due process protections),

to the hyperbolic:

> ("[a]liens detained under 8 U.S.C. § 1226(c) have committed crimēs that terminate their entitlement to remain in the United States.")

(Pet. Br. 16).

Contrary to this assertion, no administrative order of removal could be entered against Mr. Kim until, at the earliest, an Immigration Judge were to find him subject to removal. That order would not be final until affirmed by the Board of Immigration Appeals (BIA) or until the period for seeking BIA review passed. *See* 8 U.S.C. § 1101(a)(47)(B). Absent a final removal order, Mr. Kim's right to remain in the United States is established as a matter of law. *See* 8 C.F.R. § 1.1(p) ("The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.")[4]

[4] Moreover, apart from procedural rights, it is definitively not the law that being charged or even found subject to removal terminates one's lawful residence. First, IIRIRA did not eliminate all avenues of relief for persons subject to §1226(c). A non-citizen convicted of an aggravated felony may be eligible for withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(A), (B). A non-citizen may also receive relief under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001). Second, this Court's recent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) upheld *habeas corpus* relief for non-citizens subject to removal because of a prior conviction for an aggravated felony conviction. The Court held that discretionary relief under former INA § 212(c) was preserved for a large category of persons removable because of an aggravated felony. The government's assertion that such relief is merely a "matter of grace" significantly undervalues the extensive rule of law attributes of so-called "discretionary" relief from deportation. (Pet. Br. at 38); *see generally*, Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 Geo. Imm. L.J. 413 (2002). Finally, some persons detained under the statute may be able to demonstrate after a full hearing that the conviction for which the INS seeks to remove them was not an aggravated felony. *See, e.g., Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001)(holding that conviction for laundering $1,300 was not an aggravated felony); *Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (holding that state-law offenses of vehicle burglary did not make alien eligible for removal because they were neither "burglaries" nor "crimes of violence" under the INA).

The government also argues that, because § 1226(c) mandates detention in aid of removal (as compared to detention where removal is "no longer practically attainable"), it more directly implicates Congress' "plenary authority over matters of immigration policy" than did the post-final-order detention regime considered in *Zadvydas*. (Pet. Br. at 10). On its face this seems an astonishing assertion: those who are merely accused should have fewer protections than those against whom a final determination has been rendered. It also ignores the two most important limitations on the plenary power doctrine: (1) procedural due process always applies *during* deportation proceedings, *Zadvydas*, 533 U.S. at 693 ("Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law") (quoting *Shaugnessy v. Mezei*, 345 U.S. 206, 212 (1953)); and (2) that lawful permanent residents receive heightened constitutional protection by virtue of their status and ties to the community. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982)("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional

status changes accordingly."); *see also Zadvydas*, 593 U.S. at 694, ([T]he nature of [due process] protection may vary depending upon status and circumstance").[5] Because this case involves both a challenge to pre-hearing deportation procedures and a long-term lawful permanent resident, the government's plenary power argument is in fact significantly *less* persuasive than it was in *Zadvydas*.[6]

In sum, the government has its basic constitutional principles exactly wrong. There has been no question for more than a century, and there is surely no question today, that all non-citizens within the United States are 'persons' fully protected by the Fifth Amendment. This principle is especially clear as to legally-admitted permanent residents such as Mr. Kim. When the United States screened and admitted Mr. Kim as a young child, it relinquished whatever residual authority[7] it might have had to treat him as someone

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[5] *See also Johnson v. Eisentrager*, 339 U.S. 763, 770–71 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.")

[6] As the Court of Appeals recognized, this case involves an individual who retains his lawful permanent resident status and his right to live and work in this country. In contrast, *Zadvydas* involved a challenge by *former* lawful permanent residents who had already been ordered removed and had thereby lost any right to remain. *See Zadvydas*, *supra* at 720 (Kennedy, J., dissenting) ("[I]t must be made clear these aliens are in a position far different from aliens with a lawful right to remain here."). Thus, the government's argument as to plenary power in this case is backward. If anything, the concerns of which gave rise to the plenary power doctrine are implicated *more* by the persons at issue in *Zadvydas*—those found to be subject to removal—than to those merely accused. In addition, the detention scheme in *Zadvydas* provided a procedure, albeit an informal one, through which persons who had been ordered removed could demonstrate lack of danger and flight risk and perhaps qualify for release. In contrast, the statute at issue here provides no such possibility.

[7] *Amici* do not concede that any person is completely outside the protections of the constitution when the U.S. government seeks to act to detain or prevent entry into U.S. territory. This question, however, is well beyond the scope of what is presented by this case.

outside of the protections of our Constitution. There is no basis in logic, justice or precedent for the proposition that the 'plenary power' of the government overrides due process protections for lawful permanent residents. Nor does it mandate deferential review of detention laws.

ARGUMENT

I. ALL NON-CITIZENS WITHIN THE UNITED STATES ARE PROTECTED BY THE CONSTITUTION WHEN THE GOVERNMENT ACTS TO DETAIN OR TO REMOVE THEM

A. The Plenary Power Doctrine Was First Developed in a Largely Discredited Case Involving the Exclusion of Non-citizens

The 'plenary power doctrine' originated in *The Chinese Exclusion Case* (*Chae Chan Ping v. United States)*, 130 U.S. 581 (1889). That case involved a Chinese laborer who, in 1887, had obtained a certificate permitting him to re-enter the United States. The Court held that he had no right to challenge his subsequent exclusion from the country as a result of an 1888 statute that voided previously obtained certificates. As articulated by Justice Field, writing for the majority, Congress' ability to pass legislation to exclude non-citizens, "is a proposition which we do not think open to controversy." *Id.* at 603. More broadly, the Court concluded that the federal power to exclude non-citizens was an inherent attribute of sovereignty, extra-constitutional, essentially unchallengeable by anyone, and unreviewable by the judicial branch. *Id.* at 604, 609.

The Court reasoned similarly in another case from the same era: *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), again affirming the federal government's plenary power to exclude without judicial intervention. The Court found that it was not "within the province of the judiciary" to order the entry of foreigners who are not residents of the United States. For such people, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 660. With important limitations described below, the Court has generally adhered to this rule - declining to intervene in cases involving the determination of whether a particular non-citizen will be admitted or excluded from the country, except as authorized by statute or regulations.

The doctrine reduces to the idea that because authority over immigration into the United States flows from sovereignty itself -- particularly the need for the sovereign to control relations with other nations -- certain decisions implementing the immigration power may receive at most highly deferential judicial review.[8]

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[8] For descriptions of the plenary power doctrine and its limitations, see generally T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis, 16 Geo. Imm. L. J. 365 (2002);* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases,* 113 Harv. L. Rev. 1890 (2000); Margaret Taylor, *Detained Aliens: Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Constit.. L.Q. 1087, 1128-39 (1995); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. Rev.. 933, 939-951 (1995); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 Am. J. Int'l L. 862, 864-69 (1989); Gerald Neuman, STRANGERS TO THE CONSTITUTION,(Princeton University Press 1996); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev.853, 854-63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. REV. 255, 256-78; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev.. 165, 166-80 (1983); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625, 1632-50 (1992); Hiroshi

As its name suggests, *The Chinese Exclusion Case* involved a law with ugly racial undertones. More specifically, however, it concerned the government's *exclusion* of a non-citizen at the border. Although Chae Chan Ping had previously resided in the United States, the Court at this time treated him as a first-time entrant without constitutional status.[9] Justice Field, using rather inflammatory discourse, reasoned that the exclusion of foreigners was an "incident of sovereignty:"

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.

Id. 130 U.S. at 606

For various reasons, since its first enunciation, the plenary power doctrine has proven controversial, generating strong dissents and significant limitations in virtually every case in which the government has sought for it to be applied. *See also Reid v. Covert*, 354 U.S. 1, 5-7 (1957) (stating that the United States is "entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. . .") (footnotes omitted). As many

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Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 550-60 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 14-18 (1984).

[9] This aspect of the case as to lawful permanent residents has been definitively rejected by *Landon v. Plasencia, supra.*

commentators have noted, the plenary power doctrine has impeded the development of coherent principles of constitutional immigration law. *See e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990) (suggesting that the plenary power doctrine has prevented the growth of a coherent constitutional framework for immigration law, within which its sub-constitutional levels: statutes, regulations, agency directives, etc, can develop and be administered fairly and predictably.)

The doctrine became most controversial in the context of deportation. In *Fong Yue Ting v. United States,* 149 U.S. 698, 707 (1893), the Court majority stated that "the right of a nation to expel or deport foreigners…rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance." The case involved the deportation of Chinese persons who could not meet a statutory requirement of a "credible white witness." Within a decade, however, the basic position advocated by the dissenters generally prevailed and has been the law ever since.

The notion of 'plenary power' within U.S. territory, especially as applied to lawful permanent residents, had proved deeply troubling from its earliest assertions. As Justice Brewer asked in dissent in *Fong Yue Ting*:

> Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists.

149 U.S. 698, 737 (1893). [10]

The language of the *Fong Yue Ting* majority - that the power to deport was as "absolute and unqualified" as the power to exclude - was dramatic, if not shocking. Taken literally, it could have meant that non-citizens, legally resident or not, have no constitutional rights at all in deportation proceedings. The Court, however, tested and rejected this extreme proposition three years later in *Wong Wing v. United States*. The 1892 Act at issue in *Fong Yue Ting* also contained a section that provided for the imprisonment at hard labor for up to a year of any Chinese citizen judged to be in the U.S. illegally. The statute provided no right to trial by jury. The Court held this provision unconstitutional, even though detention or temporary confinement was permissible "as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens." *Id.* at 235. When Congress pursues deportation policy by subjecting non-citizens to "infamous punishment at hard labor, or by confiscating their property," however, then "such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused." *Id.* at 237

Although the *Wong Wing* Court generally reaffirmed aspects of the holding of *Fong Yue Ting*, it seems to have viewed the constitutional civil/criminal line as more important than the "plenary power" doctrine that had previously been applied to deportation. The Court in *Wong Wing* sought a consistent 'theory of our government' with

[10] *See also, Mezei, supra*, 345 U.S at 226 (Jackson, J., *dissenting*) ("Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities?"); *Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Marshall J., *dissenting*) ("Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement.")

which to distinguish deportation from punishment. 163 U.S. at 238. *See generally*, Kanstroom, *Deportation, Social Control, and Punishment, supra.* It did not seek an overarching extra-constitutional principle based upon the status of alienage to avoid the apparent dilemma presented by the 1892 law:

> But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.

Id. at 237.

The Court in *Wong Wing* thus made it very clear more than a century ago that the implications of *Yick Wo v. Hopkins* were powerful, even in the deportation context. All persons in the United States are entitled to the protections of the Fifth and Sixth Amendments. Generalizations about plenary power and deference cannot override those basic rights.

B. There is a Well-Recognized Distinction Between the "Plenary Power" of Congress as to Substantive Immigration Laws and the Constitutional Limits on that Power to Detain Individuals Within the United States

This Court, as noted above, has long held that non-citizens within our physical borders are persons within the meaning of the Due Process Clause. *See, e.g., Yick Wo,* 118

U.S. at 369; *Wong Wing,* 163 U.S. at 238; *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments"). *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 272-74 (1973) (Fourth Amendment protects as to searches and seizures within the United States). This is no less true when persons are placed in removal proceedings. Concurring in *Wong Wing,* Justice Field, the original author of the 'plenary power doctrine,' put the matter as follows:

> The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic . . . This has been decided so often that the point does not require argument.

163 U.S. at 242 (Field, J., concurring in part and dissenting in part).

The Government has suggested in this case that § 1226(c) is subject to deferential or at most "rational basis" review because it arises in the context of immigration, an area in which Congress has traditionally been afforded "plenary" authority. (Pet. Br. at 32-33). This Court has repeatedly emphasized, however, that there is a profound difference between Congress' authority as to substantive immigration policy choices, such as visa categories, and the means chosen to implement and enforce those choices.[11] This dichotomy in constitutional immigration law, though hardly unproblematic, makes some sense in light of the underlying premises that gave rise to the plenary power doctrine. The distinction preserves the power of the political branches to

[11] As this Court noted in *Galvan v. Press*, "policies" are entitled to judicial deference, but "the government must respect the procedural safeguards of due process." 347 U.S. 522, 742 (1954).

control entry into and lawful status within the United States, as well as substantive naturalization authority. Matters of procedure, conversely, concern questions that are traditionally recognized as within judicial competence and expertise. This is particularly true as to procedural matters that arise pending the final resolution of a removal proceeding.

The constitutional question in this case in no way implicates substantive immigration policy choices. The grant of a bond hearing or even release from detention does not grant to the non-citizen the lawful status that under the plenary power doctrine is held to be under the control of the political branches. The constitutionality of mandatory detention without any time limit and without any individualized determination of danger or flight risk is a question that is well within the authority of the judicial branch. As Justice Jackson noted in *Mezei, supra*, "Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is outside our gates." Jackson, J. *dissent* 345 U.S. at 218.

Moreover, although detention is a procedural aspect of the deportation process, it raises basic constitutional issues whenever and against whomever it is used.[12] *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. . . .[therefore] we have sustained civil commitment statutes when they have coupled proof of

[12] *See e.g., United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989)(holding, post-*Salerno*, that "in determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision[ ] . . . but also additional factors such as the length of the detention that has in fact occurred or may occur in the future"); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) ("Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly.")

dangerousness with the proof of some additional factor, such as a mental illness or mental abnormality.") (citations and quotations omitted); *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) ("Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed"); *United States v. Salerno*, 481 U.S. 739, 747 (1987)("general rule" of substantive due process is that the government may not detain a person prior to a judgment of guilt in a criminal trial); *Addington v. Texas*, 441 U.S. 418, 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (an individual held as unfit to stand trial cannot be committed for more than a reasonable period necessary to determine whether he will become competent in the foreseeable future). As this Court recently noted, it has "upheld preventive detention based on dangerousness only when . . . subject to strong procedural protections," including, "proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards" *See Zadvydas*, 533 U.S. at 678 (citing *Salerno*).

Though it is a means to the end determined by substantive immigration policy, the means itself is subject to close constitutional scrutiny. *See Wong Wing,* (stating that detention or temporary confinement by immigration authorities constitutes, "part of the means necessary to give effect to" substantive decisions about exclusion or deportation). Indeed, *Wong Wing* involved a statute that authorized executive imprisonment of certain non-citizens for one year after the entry of a final order of deportation. *Id.* This Court, while acknowledging the government's broad power over immigration and the permissibility of "temporary confinement . . . while arrangements [are] being made for their deportation" nevertheless struck down the statute. *Id.* Quoting *Yick Wo's* holding that the Fourteenth Amendment is "universal in [its] application to all persons within the

territorial jurisdiction, without regard to . . . nationality," the Court continued:

> All persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and . . . even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.

Id. at 238; *Yick Wo,* 118 U.S. at 369.

As the Due Process Clause protected Wong Wing against arbitrary detention, it surely protects those who, like Mr. Kim, were lawfully admitted to the United States, during proceedings to determine whether they are even subject to removal.

Among the many reasons to support such a protective rule is a basic concern with the dangerous precedent that would be set by the allowance of government power to incarcerate anyone without a bail hearing, based solely on an accusation. As Thomas Jefferson --writing particularly to oppose the Federalists' Alien Friends Act, Alien Enemies Act, and Sedition Act [13] --warned, in 1798: "The friendless alien has indeed been selected as the safest subject of a first experiment, but the citizen will soon follow. . . ." [14]

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[13] Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired June 25, 1800) (permitting the President to order any alien whom he judges "dangerous to the peace and safety of the United States" to leave the country without a hearing); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–23 (1999)) (permitting the President during war to apprehend, restrain, secure, and remove all enemy aliens without a hearing); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801).

[14] *See The Kentucky Resolution*, Documents of American History 181 (Henry Steele Commager ed., 6th ed. 1958).

Moreover, the *Wong Wing* principle of constitutional limitations on government power was and is completely consonant with the evolving jurisprudence of this Court as to the rights of non-citizens in deportation proceedings. As the Court stated seven years later, in *Yamataya v. Fisher*, "this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" 189 U.S. at 100. In *Yamataya*, a non-citizen was arrested after entering the United States on the ground that she was a pauper and therefore ineligible to become a permanent resident. The government insisted, with arguments not dissimilar to those presented in this case, that its plenary power over immigration overrode the protections of the Fifth Amendment. The Court, however, rejected that argument, holding that the statute being reviewed must be interpreted to "bring [it] into harmony with the Constitution" and its due process guarantees. *Id.* at 101.

Since *Yamataya*, the Court has reiterated repeatedly that non-citizens are entitled to due process during deportation proceedings. *See e.g., Mezei,* 345 U.S. at 212 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); *Johnson v. Eisentrager*, 339 U.S. 763, 770–71 (1950) (recognizing that aliens are protected "against Executive deportation except upon full and fair hearing"); *Bridges v. Wixon*, 326 U.S. 135, 150–57 (1945); *see also Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"). Plenary power, in sum, has nothing to do with the due process calculus required in this case.

Nor should this Court apply a 'categorical' model that would dramatically differentiate the due process rights of citizens from those of non-citizens. The Constitution, though it makes some categorical distinctions between citizens and non-citizens, surely does not leave the latter rightless. Most of the textual distinctions involve political rights such as election to federal office and voting. [15] The Bill of Rights, however, uses non-categorical, broader terms such as "person" and "the accused" that have long been construed to protect non-citizens. *See e.g., Wong Wing v United States, supra, Yick Wo, supra.* Thus, although certain constitutional entitlements may be subject to categorical limitations, "categorical distinctions, founded on legal status, cannot overwhelm the proud tradition of *Yick Wo* and *Wong Wing*." *See Martin, supra.*

It was for this reason that the Court in *Carlson v. Landon,* 342 U.S. 524 (1952) upheld the Attorney General's discretionary authority to detain some deportable non-citizens deemed to be Communists, while expressly noting that "[o]f course purpose to injure could not be imputed generally to all aliens subject to deportation..." Detention at that time was based on a system, unlike § 236(c), that *included* an individualized determination that release of the particular non-citizen posed a danger to the public. *See id.* at 538, 541-42. Even though deportation in 1952 could be premised on party membership alone—a regime that would likely be found unconstitutional today--the order to detain a person pending deportation proceedings required significantly more than that. *Id. at* 541. Detention was permissible based on "evidence of membership *plus* personal activity in supporting and extending the Party's philosophy concerning violence.") *Id.* (*emphasis added*).

[15] See e.g., Art I, § 2, cl 2 (members of the House of Representatives must have been U.S. citizens for seven years); Art I, § 3, cl 3 (Senators must have been U.S. citizens for nine years); Art II, § 1, cl 5 (President must be a natural born citizen).

Reno v. Flores does not establish a contrary constitutional rule. (*See* Pet. Br. at 33). First, as a threshold matter, the *Flores* Court described the issue in that case as one of "custody" over non-citizen juveniles, rather than incarceration or detention. *See Flores* (emphasizing that the juveniles were held in licensed juvenile care facilities, not in "shackles, chains or barred cells," and that, for this reason alone, "freedom from physical restraint" was "not at issue" in the case.) 507 U.S. 292 (1993). Moreover, as in *Carlson*, the regulation in question specifically "maintain[ed] the discretion of local INS district directors to release detained minors to other custodians in unusual and compelling circumstances." *Id.* at 310 (citing 57 Fed. Reg. 17449 (1988); *see also id.* at 313-14 (noting that among the determinations INS made in each individual case was whether "the alien's case [was] so exceptional as to require consideration of release to someone else"). Most importantly, the agency discretionary determination was itself subject to review by an immigration judge, the BIA and, ultimately, the federal courts. *Id.* at 308. As this Court stated, "due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge." *Id.* at 309

II. THIS COURT HAS APPLIED THE PLENARY POWER DOCTRINE TO THE DETENTION OF LAWFULLY ADMITTED PERMANENT RESIDENTS DURING REMOVAL PROCEEDINGS TO A MUCH LESSER EXTENT THAN TO NON-CITIZENS SEEKING ADMISSION

Even in matters relating to their removal, non-citizens lawfully admitted to our country have long been treated differently than those at the border seeking first-time admission. This distinction runs deep in our constitutional

history. As Edward Livingston put it, more than two centuries ago:

> [A]lien friends...residing among us, are entitled to the protection of our laws, and...during their residence they owe a temporary allegiance to our government. If they are accused of violating this allegiance, the same laws which interpose in the case of a citizen must determine the truth of the accusation, and if found guilty they are liable to the same punishment.

8 Annals of Cong. 2012. (1798).

Since *Yamataya*, for nearly a full century, this Court has consistently differentiated the rights of non-citizens who have been admitted as permanent residents from those who have not. This differentiation reflects, among other things, the legality of the person's admission, the formality with which the nation recognizes status, mutuality of obligation, allegiance, and, often, the length of time of residence and the likelihood of family and other social ties. *Id.* ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . .. and those who are within the United States after an entry, irrespective of its legality"); *Plasencia*, 459 U.S. at 32 (adopting and applying *Mathews* standard for evaluating whether deportation procedures satisfy due process for returning lawful permanent residents.)

Plasencia demonstrates that this distinction is generally based both on the location of the non-citizen and the special protection afforded to lawful permanent residents. 459 U.S. at 30-32. *Plasencia*, a resident alien who had

briefly left the United States for Mexico, was caught smuggling aliens upon her return. *Id.* at 23. The government argued that she should be treated as an "excludable alien," with no due process rights. But in an opinion for eight members of the Court (and with Justice Marshall concurring), Justice O'Connor disagreed and held that Plasencia was protected by the Due Process Clause. *Id.* at 32. "Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Id.*; *see also Reno v. Flores*, 507 U.S. 292, 306-07 (1993) (holding that detention of aliens during the deportation process must be measured by the Due Process Clause).

This approach involves recognition by this Court of long-standing aspects of the U.S. immigration system. Since the 1920s, U.S. law has been characterized by administrative practices that distinguish admission for permanent residence from that for a temporary stay. Lawful permanent residents--green card holders--have wide access to employment and are generally as protected as citizens in their rights to enter into contracts and to acquire property. They are the only group of non-citizens directly eligible to apply for citizenship. Lawful permanent residents are also subject to some obligations quite comparable to those imposed on citizens. In general, they are taxed as are citizens, based on their worldwide income.[16] They are subject to conscription.[17] These legal protections reflect deep emotional and psychological realities. As one commentator has noted of lawful permanent residents: "In general, they come to stay, they shift their expectations about where home is, and they sink roots they

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[16] *See* David M. Hudson, *Tax Problems for Departing Aliens*, 97-03 Immigration Briefings 1-3 (March 1997).

[17] See, e.g., Selective Service Act of 1948, c 625, Title I, § 3, 62 Stat 604, 605. Although no conscription currently takes place, resident aliens must register for the draft, while non-immigrants are expressly exempt from registration. 50 USC App § 453 (2000). Unlike citizens, LPRs have been permitted to opt out of subjection to conscription, but only at the cost of becoming ineligible for naturalization. *See* INA §§ 101(a)(19), 315, 8 USC §§ 1101(a)(19),1426 (2000).

rely on to be durable." Martin, 2001 Sup. Ct. Rev. at 104. This understanding "does not rest only on idiosyncratic expectations or exaggerated hopes adopted by the [lawful permanent residents] themselves." Instead it is anchored in a whole host of social and cultural expectations on the part of those around them about what it means to be a U.S. lawful permanent resident, "manifested in seventy-five years of consistent governmental practices." *Id.* Notwithstanding the government's apparent invitation to do so, this Court should not over-ride these considerations by disparaging the well-recognized rights of lawful permanent residents.

III. THE PLENARY POWER DOCTRINE DERIVES FROM THE COURT'S RECOGNITION OF THE EXECUTIVE'S AUTHORITY OVER FOREIGN AFFAIRS, A CONSIDERATION WITH VIRTUALLY NO RELEVANCE TO THIS CASE

The government claims 'plenary' power to incarcerate Mr. Kim without even granting him a hearing to determine whether he is a flight risk or a danger to the community. To do so, it implicitly invokes the political branches control over foreign affairs, from which the plenary power doctrine is largely derived. This foreign affairs interest, however, has virtually no conceivable relevance to Mr. Kim, whom the government has already screened and admitted to our country as a young child. As this Court has previously noted, "Not every case that 'touches foreign relations lie beyond judicial cognizance.'" *Baker v. Carr*, 369 U.S. 186, 211 (1962).

A recurring *leitmotif* in the Court's plenary power decisions is the relationship between the political branches' control over immigration and their ability to conduct foreign affairs. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-

25 (1999); *Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *The Chinese Exclusion Case,* 130 U.S. at 604-07. The foreign policy concerns that animated cases involving the detention of excludable or inadmissible non-citizens are absent here. Indeed, the underlying reasons for the development of the plenary power doctrine seem less applicable here—where a person has merely been accused of an immigration law violation—than they were in *Zadvydas, supra*, which involved persons who had previously been found subject to removal.

Mr. Kim was screened by immigration officials, admitted lawfully for residence, has remained in the United States and has developed substantial ties with and in our society. Unfortunately, he now faces removal proceedings due to his conviction of certain crimes. But according Mr. Kim basic constitutional rights surely does not "leave an unprotected spot in the Nation's armor." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953). This is certainly not a case where foreign nations threaten our sovereignty by forcing large numbers of would-be immigrants upon us.[18] Nor is this a case like *Aguirre-Aguirre* where the question was whether the non-citizen's conduct in his home country was politically motivated. 526 U.S. at 423-32. Here, the only grounds for deportation and detention relate to Respondent's past conduct wholly within the United States. Unlike *Aguirre-Aguirre*, the legal issue in this case does not

[18] Decisions upholding the detention of excludable non-citizens often rest upon the claim--wholly inapplicable here--that detention is necessary to protect our nation from the influx of large numbers of unwanted immigrants. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) aff'd, 472 U.S. 846 (1985) (asserting that release of excludable aliens "would ultimately result in our losing control over our borders. A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back"); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1448 (9th Cir.; en banc), cert. denied, 516 U.S. 976 (1995) (quoting Jean); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1447 (5th Cir. 1993) (same).

involve foreign affairs at all. Indeed, the government does not seriously advance any meaningful foreign policy consideration justifying unlimited detention of Mr. Kim.

Amici submit that this Court marked the proper bounds of plenary power in *INS v. Chadha*, when it properly refused to apply that doctrine where no significant connection to foreign affairs had been demonstrated. 462 U.S. 919. While noting the existence of the plenary power doctrine, the Court struck down a statute permitting a legislative veto of the Attorney General's decision to withhold individuals' deportations because Congress had chosen a constitutionally impermissible means to implement its power. *See id.* at 940-41, and *Legomsky*, *supra*, at 299-303 (discussing *Chadha*).

CONCLUSION

Careful judicial review of statutes that provide for mandatory detention of lawful permanent residents without time limit or meaningful individualized hearing do not intrude upon the legitimate authority of the political branches. Indeed, the decision of the Court of Appeals upholds the basic principle--first expressed in *Wong Wing, supra*, and never doubted since--that so long as he remains within the territory of the United States, even a deportable non-citizen remains entitled to the protections of the Fifth Amendment. The judgment below should be affirmed.

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